BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM E. SAMPLE	)	
Claimant	)	
	)	
VS.	)	
	)	
HILAND DAIRY COMPANY	)	
Respondent	)	Docket No. 1,031,373
	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requests review of the November 30, 2006 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant's accident arose out of and in the course of his employment, and authorized the payment of medical bills, temporary total disability benefits and for Dr. Jay Stanley Jones to serve as the treating physician.

The respondent requests review of preliminary hearing Order asserting that claimant failed to establish that he met with personal injury out of and in the course of his employment on August 31, 2006. Succinctly put, respondent argues that the "claimant was in direct and willful violation of respondent's policies regarding entering the plant through unauthorized entrances and entering food storage areas in street clothes at the time of his accident".[1] Thus, under K.S.A. 44-501(d)(1), respondent believes claimant's accident is not compensable.

[1] Respondent's Brief at 1 (filed Dec. 20, 2006).

In addition, respondent contends claimant substantially deviated from the confines of his employment and effectively abandoned his employment by using a locked door to enter the plant. Thus, his accident did not arise out of the course of his employment with respondent.

Claimant argues that the ALJ should be affirmed in all respects, based upon the Board's rationale expressed in *Blackmon*.[2]

The only issue to be resolved in this dispute is whether claimant's accident arise out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

There is no dispute as to the fact of claimant's accident which occurred on August 31, 2006. At approximately 5:15 a.m. that morning, claimant parked his car and walked to his place of employment. While on the respondent's premises, claimant climbed up a ladder, punched in a code on a door lock and started to enter the building. Unfortunately he lost his balance and fell backwards, breaking his right wrist.

Claimant had taken this route in to work 2-3 times per week during his entire 9-1/2 years there at the plant, despite the fact that he knew employees were supposed to use another door to enter the plant. Nevertheless, claimant was never reprimanded for using this door to enter the building before his accident. The purpose of this rule against using this door is not only to meet certain FDA requirements for food safety, but also to meet certain Homeland Security requirements. Essentially, employees are not to enter this room unless they are appropriately dressed in work clothing.

Claimant denies knowing, in advance, that this avenue of entering the building was prohibited. He testified that it is a shorter way to enter the building and he had never been counseled against using this particular door. Since his accident claimant was counseled, in writing, against entering the building through this door. And according to Jeff Zielke, the plant manager, had claimant not used this door this accident could have been prevented.

Respondent concedes claimant was on its premises at the time of his accident. However, respondent maintains that claimant's method of entry was prohibited by its safety policies and "it should have been obvious to him [claimant] as a reasonable person, that climbing a ladder next to an elevated door and attempting to go from the ladder to the door while holding his lunch pail and punching in the code to open the door, was dangerous.

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[2] *Blackmon v. York UPG Wichita*, No. 1,007,321, 2003 WL 1477912 (Kan. WCAB Feb. 28, 2003).

No reasonable person could fail to perceive the danger in this activity nor could any reasonable person assume that such a door was an acceptable entrance into the building."[3] This violation, according to respondent, constitutes a violation of a safety rule and thereby invalidates claimant's claim under K.S.A. 44-501(d)(1). And respondent argues that claimant's actions in violating this safety policy constitutes an abandonment of his employment with respondent. In either instance, respondent maintains claimant's accident is not compensable.

The ALJ concluded claimant's accident arose out of and in the course of his employment and was therefore compensable. The ALJ explicitly stated that she was persuaded by the Board's opinion in *Blackmon*.[4]

The Act is to be liberally construed to bring both employers and employees within its provisions, affording both the Act's protections. The Act is to be applied impartially to both employers and employees.[5] But before an accidental injury is compensable under the Act, the accident must arise out of and occur in the course of employment.

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. . . .[6]

The Act does not define "arising out of and in the course of employment" other than to state what shall not be construed as satisfying the definition.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .[7]

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[3] Respondent's Brief at 16 (filed Dec. 20, 2006).

[4] *Blackmon v. York UPG Wichita*, No. 1,007,321, 2003 WL 1477912 (Kan. WCAB Feb. 28, 2003).

[5] K.S.A. 2005 Supp. 44-501(g).

[6] K.S.A. 2005 Supp. 44-501(a).

[7] K.S.A. 44-508(f).

The Courts have provided additional guidance and have held that an accident "arises out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Accordingly, an injury arises out of employment if it arises out of the nature, conditions, obligations, or incidents of the employment.[8] Additionally, the phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the employee was at work in the employer's service.[9]

Moreover, the Kansas Supreme Court has held that once an employee reaches an employer's premises, the risks to the employee are causally connected to the employment. Therefore, an injury sustained on the premises may be compensable even if the employee has not yet begun work. In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment. . . . However, **once the employee reaches the premises of the employer, the risks to which the employee is subjected have a causal connection to the employment, and an injury sustained on the premises is compensable even if the employee has not yet begun work**. . . .[10]

Kansas law has long held that accidents occurring on an employer's premises while an employee is walking into work may arise out of and in the course of employment.[11] In *Teague*, the Kansas Supreme Court determined that it was "quite clear" that an employee's slip and fall on ice while walking into work and the resulting injuries were incidental to the employment and compensable under the Workers Compensation Act. And in *Chapman*,[12] the Kansas Supreme Court stated, "[i]f the employee is injured on the way to or from work while on the employer's premises or on a special hazard route, the employee is eligible for coverage [under the Act]."

Respondent argues claimant deviated from his employment when he entered the premises through a door he was not to use. It also argues, in essence, that claimant's

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[8] *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] *Id.* at Syl. ¶ 1.

[10] *Thompson v. The Law Offices of Alan Joseph*, 256 Kan. 36, 46, 833 P.2d 768 (1994). (emphasis added).

[11] *Teague v. Boeing Airline Co.*, 181 Kan. 434, 312 p.2d 220 (1957).

[12] *Chapman v. Beech Aircraft Corp.,* 258 Kan. 653, 655, 907 P.2d 828 (1995).

accident did not arise out of his employment because he was allegedly forbidden from walking in the area where he fell when dressed in street clothes.

Claimant was on respondent's premises when he was injured, taking a short cut to begin his workday. He was in a place that was, in retrospect, prohibited, entering through a door the respondent did not want claimant to use. Nonetheless, even though this was not a door claimant was supposed to use, this Board Member does not find that these actions rise to the level so as to find that claimant abandoned his employment. He used this door several times a week, without incident. Other employees used this door, at least up to the time of claimant's accident. There is no contention that claimant was surreptitiously using this door or made an effort to hide his actions. To the contrary, it appeared to be an open and obvious habit of his. For these reasons, this Member finds that claimant did not abandon his employment and in fact, his accident arose out of and in the course of his employment with respondent.

In order to deny benefits for failing to use a safety guard or for performing a prohibited activity under K.S.A. 44-501(d)(1), Kansas law also requires that such activity be done willfully with a headstrong or stubborn disposition. The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[13] and the Kansas Court of Appeals in *Carter*[14] defined "willful" to necessarily include:

> ...the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.'[15]

Finally, in order to deny benefits for failing to use a safety guard or for failing to obey a safety policy, there must be a relationship between the accident and the prohibited activity. The uncontroverted purpose of this safety policy is to ensure the safety of the respondent's food product, not to avoid employee accidents. Thus, the apparent violation of respondent's safety policy does not invalidate claimant's claim. Not only does the policy bear no relationship to *claimant's* safety, but the statute referenced addresses safety "guard" or a safety protection. Neither is involved in this claim. Accordingly, the facts neither establish that claimant was engaged in prohibited activity at the time of the accident nor that claimant stubbornly and willfully violated a safety policy.

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[13] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[14] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[15] *Id.* at 85 (reference and citation omitted).

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[16] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 30, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2007.

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BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[16] K.S.A. 44-534a.